No. 43471-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NAINOA FONTAINE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary R. Tabor, Judge
Cause No. 12-1-00054-2

BRIEF OF RESPONDENT

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2. Whether the accomplice liability statute violates the First Amendment protections of free speech.

B. STATEMENT OF THE CASE.

1. Substantive facts.

On January 7, 2012, Nainoa Fontaine was living with his friends Daniel Gault and Heather Inks, and Inks' four-year-old daughter. Fontaine was given the bedroom just inside the front door of the residence. RP 50, 87.[1] All of the adults were heroin addicts. RP 84, 90-91. They supported themselves primarily by panhandling. RP 98. They were all suffering symptoms of heroin withdrawal on that day, and were ill. RP 133. They all knew Jaffeney Gohl, although she was better acquainted with Gault than the others. RP 40. Gohl also used heroin. On January 7, she received a text message from Fontaine who was using a phone belonging to Inks. RP 90, 443. The message said that Fontaine was sick and a subsequent message asked her to get him some

[1] Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the trial transcript dated May 15 through May 18, 2012.

heroin. RP 45. Fontaine testified at trial that he was not really ill at the time, but knew he would be in a few hours and wanted to make his situation look urgent so Gohl would respond more quickly. RP 444-45,

Gohl obtained the drugs, then met up with her friend Beau Hymas.[2] RP 47. Hymas had a friend who wanted to buy a television set, and Gohl understood that Gault had one to sell. RP 47, 215. Gault did not want the friend, Stephen Santella, to come to his house, so Hymas was acting as an intermediary in the television transaction. Santella gave Hymas $400 or $500; Hymas had some cash of his own. RP 216. Gohl and Hymas went to the Gault/Inks residence. RP 51, 218. Gohl sent Fontaine a text message making it clear that he would have to pay for the drugs. RP 48.

Around 5:00 to 6:00 p.m., Gault told Inks to go into the back bedroom because he didn't want her to be a witness to a crime. RP 99. Gohl and Hyams walked into the Gault/Inks residence and shut the door behind them. According to Gohl, Fontaine immediately came out of his bedroom and stood by the door, blocking it. RP 52. Gault pointed a gun at them and demanded

[2] According to Fontaine, Hyams was the drug dealer and Gohl was his driver. RP 447.

their money and drugs. RP 52-53. Gohl believed the gun was real, RP 52, as did Hyams initially. Hyams testified that as they were leaving Gault hit the gun against his leg and it made a plastic sound that made him think it was probably a pellet gun. RP 227-28. According to Hyams, Fontaine told them to empty their pockets and give him the money. RP 222. Hyams handed his wallet to Fontaine, who counted out $100 of the money, returned it to the wallet, and handed the wallet back to Hyams. RP 53, 55-56, 224-25. Gohl was unclear to whom she handed the drugs, but she testified that they were eventually given to Gault. RP 72-73. Gault yelled at them to get out, and they left. RP 57, 225.

After Hyams and Gohl left, Gault and Fontaine went into the back bedroom where Inks waited and they divided up the drugs and money. RP 104. Inks was preparing to help Fontaine inject the drugs because he wasn't very good at it and kept injuring himself. RP 105, 460.

Gohl and Hyams left the residence and drove to Ralph's Thriftway parking lot, where Santella was waiting. RP 58, 228. When they told him what had happened he was very angry, because most of the money taken was his. RP 59, 228. He insisted on going back to the Gault/Inks residence to retrieve the

money. RP 50. Although neither Hyams nor Gohl was enthused about that idea, they acquiesced. RP 59, Gohl again drove. She parked on the street out of sight of the house; Hyams and Santella got out and Gohl waited in the vehicle. RP 59-60, 231. Santella knocked on the door of the residence and it was opened after a few seconds. Hyams was directly behind Santella. Instantly a struggle ensued between Santella and Gault, which moved outside the house. RP 233-34. Hyams heard Santella say that Gault had a knife; Santella instructed Hyams to get it. Hyams stepped on the knife which was still in Gault's hand. Fontaine also got involved in the fight in an effort to break it up. Gault kicked Hyams in the legs, causing Hyams to let go of the knife, but this gave Santella time to get to his feet. Hyams and Santella fled back to the vehicle where Gohl waited. RP 233-36.

Santella was covered with blood. RP 60. The three returned to Ralph's Thriftway, where Santella's girlfriend waited. RP 236. During the drive, Hyams kept pressure on Santella's wounds. Santella wanted to call an ambulance, but Hyams thought it would be quicker for Santella's girlfriend to take him to the hospital. RP 61-62, 237. Santella told Hyams and Gohl to leave, which they did. RP 62, 238. Someone called 911, and police

arrived at Ralph's Thriftway while Santella was still there, holding a sweatshirt to his ear and with blood on his hands and torso; he was taken to the hospital. RP 7, 17.

The police viewed video recorded by Ralph's Thriftway's security system, RP 13-16, and interviewed Santella at the hospital. RP 17. As a result, the Gault/Inks residence was identified as the location where Santella was injured and officers went there. RP 17-18. Although there was movement visible at a window, RP 21, only Fontaine would come outside or speak to the officers, RP 21-22, 26, so the officers applied for a search warrant. RP 26. The warrant was granted and officers entered the house using a ram to pry the door open. RP 28-29. Gault and Inks were inside. RP 30.

When Fontaine exited the house, he spoke to the police and told them that two men arrived at the house and instigated a fight, without mentioning the earlier robbery or anything about drugs. RP 24-25, 294-95. After giving his statement, Fontaine was not detained but he stayed outside the house, even leaving once and returning. RP 24-25, 297, 300, 359. After interviewing Inks and Gault, and finding discrepancies in the accounts, the officer interviewed Fontaine a second time. RP 297-300, 305, 333. He was again free to leave. RP 367. Fontaine was contacted a third

time when officers learned that he had been texting to Gault inside, before the search warrant was obtained, advising him to flee the residence via a bedroom window and the neighbor's back yard, as well as outlining the story Fontaine had told so Gault could tell the same story. RP 375, 393-96. This time Fontaine was arrested. RP 367.

Fontaine testified at trial that when he asked Gohl to get heroin for him, he intended to keep it for himself rather than share with Gault and Inks, as he customarily did, but he had neglected to advise Gohl of that and he was trying to intercept her before she spoke to the others. RP 449-50. He said he was not blocking the doorway, but only standing there because he was trying to reach Gohl first. He had no idea Gault was going to commit a robbery, although Gault had previously talked about robbing people, because Fontaine had not told Gault that Gohl and Hyams were coming. RP 454. Although Gault instructed him to take the money and drugs from Gohl and Hyams, he was unable to do it and Gault took both from the victims. RP 456-57. After they left, Gault told Fontaine to get out of the house too because he was upset with his

lack of cooperation. Gault took the money and drugs to the back bedroom and Fontaine got none of either. RP 457.

Fontaine testified that Inks then came to his bedroom with a loaded syringe and was about to inject him when he saw Hyams outside the house. He yelled at Gault not to open the door, but he heard a thud, Inks dropped the syringe, and when Inks screamed at him to help Gault, Fontaine went outside. Gault was being pinned to the ground by a male; Fontaine pulled the attacker off of Gault. RP 460-465. The attacker and Hyams ran away. Fontaine was afraid Gault would follow and try to kill them with the knife he still held in his hand, so Fontaine stayed close to Gault. He believed that Gault was merely defending himself against an unprovoked attack. RP 466. Fontaine said he spoke to the police even though Gault did not want him to, RP 479, and that he lied to the police because he was afraid he'd be arrested for drug offenses. RP 480.

2. Procedural facts.

Fontaine was charged with first degree robbery on January 11, 2012. CP 3. On March 14, 2012, a first amended information was filed adding a charge of first degree rendering criminal assistance. No pretrial motions were made or heard. Jury trial commenced on May 15, 2012, and ended on May 18 with a verdict

of guilty to both charges. CP 18-19. Fontaine was sentenced on May 21, 2012, to a standard range sentence. CP 31-40.

C. ARGUMENT.

1. The omission of one sentence from WPIC 4.01 is not per se a manifest constitutional error that can be raised when there was no objection in the trial court, or that is reversible even if it can be raised for the first time on appeal.

Fontaine asserts that the trial court committed reversible error when it gave a "nonstandard" instruction to the jury. The challenged instruction is Instruction No. 3, CP 9-10. It is taken from WPIC 4.01, which reads:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of each crime charged beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists [as to these elements].
>
> A defendant is presumed innocent. This presumption continues throughout the trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.]

The instruction actually given to the jury in this case, Instruction No. 3, is identical to WPIC 4.01, including the bracketed language, except it omitted the last sentence of the first paragraph—"The defendant has no burden of proving that a reasonable doubt exists as to these elements." CP 9. The proposed instruction submitted by the State included the omitted language. Supp. CP 48, Proposed Instruction No. 4. Neither party objected to the instruction given. RP 472.

Fontaine cites to several cases dealing with WPIC 4.01, such as State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007), State v. Castillo, 150 Wn. App. 466, 208 P.3d 1201 (2009), and State v. Lundy, 162 Wn. App. 865, 256 P.3d 466 (2011). In those cases the instructions given re-defined or explained reasonable doubt, and were deliberate choices to use something other than the standard WPIC 4.01. In Fontaine's case, it appears that the court intended to use WPIC 4.01, and by simple oversight omitted a sentence from the first paragraph. Apparently neither attorney noticed the omission. The missing sentence deals with the defendant's burden—or rather lack thereof—to prove that a reasonable doubt exists. While it is true that the court in Bennett instructed trial courts to use only the standard WPIC 4.01, it did not

find the instruction actually given in that case to be unconstitutional. Bennett, 161 Wn.2d at 315, 318. The question in this case is whether the missing sentence in Jury Instruction No. 3 rendered the instruction constitutionally insufficient, such that the challenge may be raised for the first time on appeal. The State maintains that it was not, but even if it could, any error was harmless.

Fontaine argues that because the jury was not specifically told that he had no burden of proving that a reasonable doubt existed, the jury was left with the possibility that he did have such a burden. Appellant's Opening Brief at 9. That does not necessarily follow. If one says that the paper on which this brief is printed is white, that is perfectly clear without specifying that the paper is not blue or yellow or purple. The jury here was told that the State carried the burden of proof of every element of the charged crimes, which would most logically lead to the conclusion that the defendant had no burden to prove anything.

Fontaine asserts that omitting the required language from WPIC 4.01 resulted in omitting an important component of the State's burden of proof and thereby created a manifest error. Appellant's Opening Brief at 9. He cites to Bennett for language that this "shifts, perhaps ever so slightly, the emphasis of the

instruction." Id. But that sentence, in its entirety, reads, "But every effort to improve or enhance the standard approved instruction necessarily introduces new concepts, undefined terms, and shifts, perhaps ever so slightly, the emphasis of the instruction." Bennett, 161 Wn.2d at 317. There was no attempt in this case to re-write the instruction or change anything. At most, it was oversight that omitted one sentence of the instruction. Fontaine does not even suggest how this introduces any new concepts or undefined terms, nor does it shift the emphasis of the instruction.

In Castillo, the trial court had given a completely nonstandard reasonable doubt instruction, and it is true that the Court of Appeals found it significant that the same sentence at issue here, that the defendant had no burden to prove a reasonable doubt, was not included in that instruction. What the court said, however, is that "The omission of the last sentence of WPIC 4.01 from the given instruction alone warrants the conclusion that instruction 3 is not better than the WPIC." Castillo, 150 Wn. App. at 473. That is not the same as saying it renders the instruction unconstitutional. The Castillo court was particularly concerned because the prosecutor, in cross-examination of the defendant and in closing argument, had suggested that the defendant had to

explain why the victim might have lied. Id. Here there is no such concern. The prosecutor spent a great deal of time cross-examining Fontaine about his own lies, but never implied that he had any duty to explain any other person's actions.

Castillo objected in the trial court to the instruction given. Castillo, 150 Wn. App. at 470. Fontaine did not object. RP 472. In general, appellate courts will not consider issues raised for the first time on appeal. It may be so raised if it is a "manifest error affecting a constitutional right." Constitutional errors are treated differently because they can and often do result in injustice to the accused and may affect the integrity of our system of justice. "On the other hand, 'permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials, and is wasteful of the limited resources of prosecutors, public defenders and courts.'" State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (cite omitted, emphasis in original).

RAP 2.5(a) concerns errors raised for the first time on appeal:

> The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the

> first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. . . .
>
> RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms. . . . Elementary rules of construction require that the term "manifest" in RAP 2.5(a)(3) be given meaning. . . . .As the Washington Supreme Court stated in State v. Scott, [*supra*, at 687] "[t]he exception actually is a narrow one, affording review only of 'certain constitutional questions.'"

State v. Lynn, 67 Wn. App. 339, 342-43, 835 P.2d 251 (1992).

If an instruction can be construed as relieving the State of its burden of proof, that can be a constitutional error. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). The instruction in this case, however, does not relieve the State of anything. It merely fails to emphasize to the extent that it could that the defendant has no burden. Fontaine asserts that there is "at least some possibility" of prejudice because at trial he "sought to suggest that he was a bystander rather than a participant in the robbery." Appellant's Opening Brief at 11-12. But to raise an alleged error for the first time on appeal, a defendant must not only identify the error but show that it actually affected his rights at trial. It is the showing

of actual prejudice that makes the error "manifest" and permits appellate review. State v. Lynn, 67 Wn. App. at 345. Even if there is manifest constitutional error, it may still be subject to a harmless error analysis. Id.

The jury in Fontaine's case clearly knew that the charges were accusations, CP 6, that Fontaine had pled not guilty, and the State had the burden of proving every element of the charges beyond a reasonable doubt. CP 9. Instruction No. 3 was a constitutionally correct statement of the law and was not confusing. It correctly defined reasonable doubt. When the Supreme Court in Bennett directed that only WPIC 4.01, as written, be used, it was exercising its inherent supervisory power, not its constitutional error-correcting authority. Bennett, 161 Wn.2d at 318. In Castillo, Division I of the Court of Appeals reversed on the grounds that the instruction used in that case violated the "express directive" of the Supreme Court and was not an improvement over WPIC 4.01. Castillo, 150 Wn. App. at 475. Castillo does not support the conclusion that an instruction which deviates from WPIC 4.01 is per se unconstitutional.

In Lundy, this court addressed an instruction which also omitted the sentence stating that the defendant has no burden of

proving a reasonable doubt exists, but it also changed the wording of the second paragraph. Lundy, 162 Wn. App. at 870-71. The court noted the directive in Bennett to use only the standard WPIC 4.01, but found harmless error.

> An erroneous jury instruction, however, is generally subject to a constitutional harmless error analysis. . . We may hold the error harmless if we are satisfied "'beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" . . . Even misleading instructions do not require reversal unless the complaining party can show predjudice. . .

Lundy, 162 Wn. App. at 871-72. Lundy could not show that he was prejudiced or that the State was relieved of its burden of proof, and the court was satisfied that it made no difference to the outcome. Id. at 893. Similarly, Fontaine cannot show that he was prejudiced, and any error would be harmless. That particularly applies to his conviction for first degree rendering criminal assistance, since he admitted to that offense on the witness stand and his attorney conceded it in closing argument. RP 482, 552.

Fontaine attempts to find prejudice by claiming that the jury could have concluded he did not participate in the robbery because he said he didn't. Appellant's Opening Brief at 12. If the jury indeed believed him it would not matter whether it was told he had no burden of raising a doubt or not. He did testify and gave his

version of the robbery. If he had not testified, perhaps the omission of the instruction that he had no burden of proving a reasonable doubt might be more problematic, but under these circumstances it is not. He also argues that the jury might have reasonably doubted that the pellet gun appeared to be a firearm or other deadly weapon. Id. That seems extremely unlikely. Jaffeney Gohl believed the gun was real. RP 52, 57. She was terrified. RP 73. Beau Hyams thought it was real. He said fake guns usually have a very small barrel or an orange piece on them, and this one was big, like a 40 caliber weapon, with no colored piece. RP 221. Gault told him to leave or he'd be shot. RP 225. He wasn't going to quarrel with Gault and Fontaine because they had a gun. RP 226. It was not until they were leaving, after the robbery was complete, that Hyams heard the plastic sound that made him suspect the gun was probably a pellet gun. RP 227. During the search of the Gault/Inks residence, Officer Anderson located two pellet guns that appeared to be regular handguns. She testified one would not know they were not real firearms unless one was very close to them. RP 32. No reasonable juror would have doubted that the guns appeared to be real firearms.

In any event, a harmless error analysis only applies when a defendant has established both that a manifest error occurred and that the error affected an identified constitutional right. State v. Bertrand, 165 Wn. App. 393, 417-18, 267 P.3d 511 (2011) (Quinn-Brintnall, concurring). Fontaine has failed to meet this test and his claim should be denied without reaching a harmless error analysis.

2. The accomplice liability statute does not infringe on the defendant's right of free speech protected by the First Amendment.

Fontaine claims that the accomplice liability statute is sufficiently overbroad to criminalize speech protected by the First and Fourteenth Amendments.[3] He correctly notes that two divisions of the Court of Appeals have rejected this argument, but maintains that those decisions are poorly reasoned and incorrectly decided. Appellant's Opening Brief at 17-21, State v. Coleman, 155 Wn. App. 951, 231 P.3d 212 (2010); State v. Ferguson, 164 Wn. App. 370, 264 P.3d 575 (2011). His argument is that the accomplice liability statute is overbroad because it criminalizes speech made with the intent to promote or facilitate a crime without limiting that speech to imminent lawless action.

[3] Although Fontaine refers to Wash. Const. Article I, § 5 in a footnote, Appellant's Opening Brief at 14, he does not specifically argue it as a basis upon which to invalidate the accomplice liability statute. The two are essentially coextensive. State v. Immelt, 173 Wn.2d 1, 6-7, 267 P.3d 305 (2011).

Statutes are presumed constitutional and the burden is on the challenger to prove them unconstitutional beyond a reasonable doubt. State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). A First Amendment challenge requires an analysis of the language of the statute without reference to the facts of the particular case. Seattle v. Webster, 115 Wn.2d 635, 639, 802 P.2d 1333 (1990).

The accomplice liability statute is codified as RCW 9A.08.020 and reads, in pertinent part, as follows:

> (1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.
>
> (2) A person is legally accountable for the conduct of another person when:
>
> (a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or
>
> (b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or
>
> (c) He is an accomplice of another person in the commission of a crime.
>
> (3) A person is an accomplice of another person in the commission of a crime if:
>
> (a) With knowledge that it will promote or facilitate the commission of the crime, he
>
> (i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

The statute does not define "aid". It is, however, defined in WPIC 10.51, included in this record in Jury Instruction No. 9, as "all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice." CP 12-13.

Fontaine cites to the seminal Supreme Court case of Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), which articulated the following principle:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . "[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."

Id. at 447-48, internal cites omitted.

A statute is overbroad if it includes constitutionally protected speech, even though it may also prohibit unprotected speech. The First Amendment overbreadth doctrine may be invoked to invalidate a law only of that law is "substantially overbroad." Webster, 115 Wn.2d at 640-41 (citing to Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989).

Fontaine's objection to the holdings in Coleman and Ferguson lies in his claim that they rely on an analysis of the First Amendment as it applies to conduct. While Coleman does rely significantly on Webster, which dealt with a statute prohibiting the intentional obstruction of traffic, by analogy the Coleman court found that the accomplice liability statute requires the same mens rea, "to aid or agree to aid in the commission of a specific crime with knowledge the aid will further the crime." Coleman, 155 wn. App. at 961. The court in Ferguson adopted the rationale of Coleman. Ferguson, 164 Wn. App. at 376.

Even if one leaves Coleman and Ferguson out of the analysis, Fontaine still fails to establish that the accomplice liability statute, as interpreted by WPIC 10.51, is overbroad. First, the included protected speech must be substantial compared to the speech legitimately proscribed. "We will not invalidate a statute

simply because 'there are marginal applications in which . . . [it] would infringe on First Amendment values.'" United States v. Mendelsohn, 896 F.2d 1183, 1186 (9th Cir. 1990), citing to Parker v. Levy, 417 U.S. 733, 760, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974). While that equation is not easily defined, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient" to make it overbroad. State v. Immelt, 173 Wn.2d 1, 11, 267 P.3d 305 (2011). There must be a reasonable risk that the statute significantly infringes on the First Amendment rights of persons not part of the case at issue. Id.

Words used to aid in the commission of a crime must pertain to the specific crime charged, not to general criminal activity. State v. Carter, 154 Wn.2d 71, 109 P.3d 823 (2005). "Aid" is defined as "assistance." CP 13. It is not reasonable to contemplate that the defendant is assisting in some general or hypothetical crime, but rather a specific, concrete crime occurring at the time or planned in the near future. Language which assists in the commission of a crime can be considered part of the crime itself. Words which express intent or motive are not protected by the First Amendment, and words assisting in a crime can easily fall into that category. State v. Halstein, 122 Wn.2d 109, 125, 857 P.2d 270 (1993).

In Mendelsohn, the defendants had provided to an undercover police officer a computer disk containing software that was used for illegal bookmaking. The court rejected an argument that the information on that disk was protected speech. "'Where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone.'" Mendelsohn, 896 F.2d at 1185 (quoting United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985). "No first amendment defense need be permitted when the words are more than mere advocacy, 'so close in time and purpose to a substantive evil as to become part of the crime itself.'" Mendelsohn, 896 F.2d at 1186 (again quoting Freeman, 761 F.2d at 552). Language which assists in a crime is essentially part of the crime itself, a conclusion supported by the fact that accomplices incur the same culpability as the principals. Instruction No. 9, CP 12-13.

The accomplice liability statute does not run afoul of the First Amendment, and this claim should be denied.

D. CONCLUSION.

Based upon the foregoing argument and authorities, the State respectfully asks this court to affirm Fontaine's convictions.

Respectfully submitted this 1st day of March, 2013.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Respondent, on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 1st day of March, 2013, at Olympia, Washington.

Cheng McAfee

THURSTON COUNTY PROSECUTOR

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